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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| OPT GOLDEN HILLS VAC LLC,<br>Plaintiff and Appellant,<br>v.<br>SAV MAX FOODS, INC.,<br>Defendant and Appellant. | A123764<br><br>(Solano County<br>Super. Ct. No. FCS026884) |

## I. INTRODUCTION

Plaintiff OPT Golden Hills Vac, LLC (OPT) purchased a commercial property in which defendant Sav Max Foods, Inc. (Sav Max) held a leasehold interest. For a number of years, Sav Max operated a grocery store on the premises, but several years before the sale to OPT, it shuttered the building and had not been able to sub-lease the space. Several days before the sale closed, the building was broken into and electrical wiring and several switches were stolen. The sale documentation included an "estoppel certificate" executed by Sav Max, in which it made numerous representations about its leasehold. Several weeks after the sale, Sav Max sent a fax to OPT's property manager about the theft damage. Exactly 60 days later, Sav Max sent a letter to OPT's corporate offices declaring the lease had terminated due to OPT's failure to repair the damage. OPT claimed the estoppel certificate barred Sav Max from taking such action. Sav Max claimed language it added to the estoppel certificate made clear both the prior owner and OPT were responsible for repairing the theft damage and OPT's failure to do so resulted in a default and termination of the lease.

The trial court concluded the estoppel certificate was not dispositive and entered judgment declaring the lease had terminated, although on a date different than that urged by Sav Max, and awarding damages to Sav Max for rent it had paid. We reverse. Estoppel certificates are important documents in commercial real estate transactions, particularly transactions involving leasehold interests, and are intended to prevent the kind of post-sale, about-face Sav Max made in this case.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The facts in this case are largely undisputed. We recite those pertinent to the disposition on appeal.

### *The Original Lease, Cessation of Use and Vandalism of the Premises*

In August 1986, the Kirkpatrick Family Revocable Trust (Kirkpatrick) executed a build and lease agreement (the Lease) with Fleming Foods of CA, Inc. (Fleming Foods). The lease term was 20 years, commencing on April 22, 1987, and ending on April 21, 2007. In 1997, Fleming Foods assigned the Lease to Sav Max.

For a number of years, Sav Max operated a grocery store on the premises. In December 2002, Sav Max's real estate manager, George Gary Chamberlain, gave notice Sav Max would close the grocery store operation before the end of the month. In August 2004, Sav Max removed and sold the trade fixtures.

The empty building became a target for vandals. On April 29, 2005, Chamberlain visited the premises and discovered electrical wiring inside the building and circuit breakers both inside and outside the building had been stolen. As a safety precaution, Chamberlain called PG&E to shut off the power. When PG&E arrived, its employees determined the power already had been shut off at the outside box. Chamberlain informed Kirkpatrick of the break-in and theft by telephone.

Kirkpatrick submitted a claim for the theft damage to Sequoia Insurance on May 4, 2005. The following day, on May 5, 2005, Chamberlain sent a letter to Kirkpatrick confirming their earlier conversations and providing further details about the break-in. The letter stated in part: "This letter will confirm our conversation[s] . . . regarding the vandalism and theft that occurred at the [former Sav Max facility]

sometime between April 21, 2005 and April 29, 2005. [¶] . . . [¶] As I indicated earlier in the week[,] Section 16 of the Build and Lease Agreement for the referenced property clearly indicate that this theft and vandalism is covered by the fire and extended coverage endorsement you carry on the property. Section 16 reads, in part, as follows; 'The LESSOR agrees to keep in effect, at its expense, and during the original or any renewed term of this lease, a policy of fire, extended coverage, vandalism and malicious mischief and burglary insurance to cover damage to the premises. . . .' [¶] . . .[¶] Please keep me updated on the replacement of the electrical wiring to the property. As it stands now we have no power. Without power there is no way to activate the security system or the fire monitoring system."

***The Sale of the Property and Assignment of the Lease***

For several months prior to the break-in, Kirkpatrick had been negotiating a sale of the property to OPT. The sale documentation included a grant deed and an assignment of the Lease to be executed by Kirkpatrick, and a nondisturbance and attornment agreement and an estoppel certificate to be executed by Sav Max.[1]

The day before he discovered the break-in and theft, Chamberlain informed OPT that Neil Yeager, Sav Max's attorney, would be reviewing the estoppel certificate. Yeager modified the language of several paragraphs and almost a week later, on May 4, 2005, forwarded the revised estoppel certificate to Drew Willock, a private attorney representing OPT.

As revised by Sav Max (shown in italics), paragraph 3 of the estoppel certificate provided in pertinent part: "The expiration date of the Lease is *April 12, 2007* . . . . The Lease contains no option to terminate, *except in certain instances of damage or destruction as provided in the Lease*."

[1] A nondisturbance and attornment agreement commits a tenant to recognizing the buyer as the new landlord. An estoppel certificate, as we discuss, *infra*, is part of the standard documentation for a sale of commercial property subject to a leasehold and is a binding representation by the tenant as to specified aspects of the leasehold.

Paragraph 10, as revised by Sav Max (shown in italics), provided in pertinent part: "*To the best of Tenant's knowledge*, Landlord has fulfilled all of its duties and obligations under the Lease, neither Tenant nor Landlord is in default under the terms, covenants or obligations of the Lease, and no fact or condition now exists that, with notice or lapse of time or both, will become a default. Tenant has no offsets, counterclaims or credits against rentals, nor does Tenant possess or assert any claims against Landlord for any failure of performance of any of the terms of the Lease. The improvements and space required to be furnished according to the Lease have been completed in all respect and, to the best [of] Tenant's knowledge: (i) the Premises comply with all applicable laws, (ii) there are no hazardous materials on, in, under or about the Premises, (iii) there are no structural or mechanical defects in the Premises, (iv) Tenant's operation and use of the Premises does not involve the generation, storage, treatment, disposal or release of hazardous substance into the environment . . . and (v) the Premises is being operated in accordance with all applicable environmental laws. Landlord has no obligation to construct, refurbish, install, rehabilitate or renovate any existing or additional improvements in the Premises or in the Property, except *with respect to the recent theft of wiring from the Premises and damage to certain switching gear resulting from a break in*." (Italics added.)

Paragraph 14, as revised by Sav Max (shown in italics), provided: "*Notwithstanding anything in this Estoppel Certificate to the contrary, by its acceptance of this Estoppel Certificate Buyer agrees that Tenant shall have no liability of any kind or in any amount if any of the statements made in this Estoppel Certificate prove to be inaccurate, the only effect of this Estoppel Certificate on Tenant being to estop Tenant from denying the accuracy of such statements.*"

Sav Max made no changes to the preamble or paragraph 1 of the estoppel certificate, which defined the terms "Landlord," "Tenant" and "Buyer." "Landlord" with a capital "L" was defined as the "Kirkpatrick Family Trust, W.G. Kirkpatrick Trustee." "Buyer" was defined to include OPT, its lender, successors and assigns. "Tenant" was defined as "the undersigned," Sav Max Foods, Inc.

Sav Max also made no changes to paragraph 13, which provided, in part: "Tenant acknowledges and agrees that Buyer shall not be liable for any act or omission of any person or party who may have been a landlord under the Lease prior to Buyer's acquisition of title to the Property, and Buyer shall not be subject to any offset or defenses which Tenant may have against any such prior landlord."

Four days before the sale closed, on the same day Chamberlin sent the May 5 letter to Kirkpatrick confirming the telephone calls about the break-in and theft, Kirkpatrick's broker notified OPT's attorney by e-mail about the situation. The broker also stated Kirkpatrick had filed an insurance claim for the theft damage.

On May 9, 2005, Kirkpatrick executed a grant deed to OPT, and on May 10, assigned the Lease. As part of the assignment, Kirkpatrick guaranteed Sav Max's rent payments. Although Sav Max had sent the revised estoppel certificate back to OPT on May 4, 2005, Sav Max did not sign the revised certificate on May 9 or 10, apparently because it had been sent on to OPT's lender for review. On May 10, 2005, Willock (OPT's lawyer) informed Yeager (Sav Max's lawyer) OPT's lender approved Sav Max's changes, and Yeager sent the revised certificate on to Gary Hammett (vice president of real estate for Western Unified Grocers Inc. (the parent company of Sav Max)) with instructions to sign it and send the executed certificate to OPT.

Nine days after the closing, on May 18, 2005, Sequoia Insurance sent a letter to Kirkpatrick denying the claim for the theft damage. Sequoia invoked a policy exclusion applicable to premises vacant for more than 60 days.

Two days later, on May 20, 2005, Sav Max signed the nondisturbance and attornment agreement, and the estoppel certificate without making any further changes. Sav Max was not aware of Sequoia Insurance's denial of the theft damage claim.

***Notification and Asserted Termination of the Lease***

Approximately three weeks after the closing, on June 1, 2005, Chamberlain sent a fax to Laura Lomas, OPT's property manager, informing her of the break-in and theft and attaching a copy of his May 5, 2005, letter to Kirkpatrick. Chamberlain stated in the fax: "[A]s I advised during our conversation earlier this afternoon, the referenced facility was

vandalized sometime between the 21st and 28th of April. In that regard attached is a copy of my May 5, 2005 letter to Jerry Kirkpatrick, which summarizes the events relating to the theft. My immediate concern is that the building cannot be protected without power to arm the security system. . . . [¶] . . . [¶] Until the power is restored it will be difficult to secure the property, as there are vagrants who loiter in the vicinity of this property. . . . After you have had a chance to review this issue please give me a call to discuss the best plan of action to secure the property."

Exactly 60 days later, on August 1, 2005, Robert M. Ling Jr., vice president of Sav Max, sent a letter to OPT's Colorado office via overnight mail, which stated in pertinent part: "By letter dated May 5, 2005, Gary Chamberlain of our Northern California Real Estate Office informed your predecessor, William G. Kirkpatrick, of a break-in at the store which occurred sometime between April 21 and April 28, 2005. As a result of the break-in, much of the copper electrical wiring in the store was stolen and virtually all of the electrical equipment in the switching gear room was stolen. This left the store without electrical power of any kind and wholly unusable. In his letter to Mr. Kirkpatrick, Mr. Chamberlain pointed out that the theft and vandalism were casualties required to be covered by the lessor's insurance under Section 16 of the Lease. . . . In addition, in connection with your purchase of the shopping center, Sav Max made note of the lessor's obligations in this regard in paragraph 10 of the May 20, 2005 Estoppel Certificate which it supplied. Further, on June 1, Mr. Chamberlain provided your property manager, Laura Lomas with further notice and a copy of his May 5 letter to Mr. Kirkpatrick. [¶] Under Section 16B of the Lease,[2] if a casualty

[2] Section 16B of the Lease provided in pertinent part: if "the premises shall be partially or wholly damaged . . . and the . . . damage shall be sufficient to deprive LESSEE of more than twenty-five percent (25%) of the floor space therein for its purposes, the LESSEE shall notify LESSOR thereof in writing and . . . . [¶] . . . [¶] If such damage shall occur during the last seven (7) years of the original term . . . LESSEE shall further notify LESSOR of LESSEE's intent to exercise options then still available. . . . If notice be not so given to LESSOR of LESSEE'S intent to exercise such options to so renew the term . . . then LESSOR, at its sole option, may elect to rebuild and repair . . . by written notice to LESSEE within thirty (30) days after the expiration of

deprives the lessee of more than 25% of the floor space of the premises during the last seven years of the original Lease term, and the lessee does not exercise its option to extend the Lease within 30 days after the incurrence of the damage, the lessor has the option during the next 30 days to inform the lessee of the lessor's election to repair the damage. If the lessor fails to give the lessee notice of election to repair, Section 16B provides that the Lease 'shall terminate as of the date of the occurrence of such casualty, the rental shall be adjusted accordingly, and neither party shall have further rights or obligations hereunder.' [¶] More than 60 days have now elapsed since the date of the casualty. In addition, more than 60 days have elapsed since notice was given to your predecessor on May 5, 2005, and since notice was given to you on May 20 and June 1, 2005. The lessor made no election to repair during any of those periods. Consequently, the Lease has terminated by its own terms, effective as of the date of the casualty."

Michael Radford, an attorney for OPT, replied by letter dated August 5, 2005. He first stated: "If it proves that the loss was not covered because . . . the premises were vacant or some other reason related to the closing of the store, it may be that repair of the electrical system will be your responsibility. In such case the loss would be considered 'waste' under section 14 of the Lease." He next asserted Sav Max's letter to the prior owner was insufficient notice under the Lease, which required notice by certified mail, return receipt requested. He then stated "the casualty did not result in a deprivation of more than 25% of the floor space in the premises for Sav Max's purposes. The premises were vacant and the store closed. . . . [Y]our only use of the premises was a vacant store shell. . . . The electrical wiring and switch gear repair was not necessary for that purpose or use." He closed by adding "it would be wasteful to undertake the work unless and until you decide to reoccupy the space or a new tenant is located . . . . [¶] Please withdraw your claim of termination and contin[ue] making the lease payments."

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the thirty (30) day period. . . . If . . . LESSOR shall thereafter fail to so give LESSEE notice of LESSOR'S election to rebuild and repair such damage, then this lease shall terminate as of the date of the occurrence of such casualty. . . ."

Yeager responded by letter dated August 12, 2005. He reasserted that the lease had terminated by its own terms because of OPT's "failure to exercise its election to make repairs as provided in Section 16B of the Lease." He also stated OPT had been given "repeated notice," including in paragraph 10 of the estoppel certificate, but "the notices were met with silence and inaction." He then made reference, for the first time, to Section 25 of the Lease.[3] "[I]nsofar as your client contends that less than 25% of the premises were affected by the casualty, the failure to make, or even to commence making, repairs after notice resulted in an uncured and now incurable default under the terms of Section 25 of the Lease. Among the remedies available to my client under that Section is the cancellation and annulment of the Lease. Please be advised that my client has elected that remedy without waiver of its position that the Lease terminated by its own terms pursuant to Section 16B of the Lease."

Sav Max did not pay rent for August 2005 or any month thereafter. Pursuant to the rent guarantee, OPT collected rent from Kirkpatrick.

***The Lawsuit***

Two months after Sav Max claimed the Lease had terminated and it stopped paying rent, OPT filed this action in October 2005 for "declaratory relief." OPT sought a judgment decreeing "the Lease remains in full force and effect" and (a) "SAV MAX's obligation to pay rent and to otherwise perform its duties under the lease is unaffected by the matters identified in paragraph 10 of the Estoppel Certificate" and (b) "SAV MAX's obligation to pay rent and to otherwise perform its duties under the lease is unaffected by

[3] Section 25 of the Lease provided in pertinent part: "The LESSOR further covenants with the LESSEE that if LESSOR shall violate or neglect any covenant, agreement, or stipulation herein contained on its part to be kept, performed or observed, and any such default shall continue for thirty (30) days after written notice thereof is given by LESSEE to LESSOR (or, with respect to defaults which cannot reasonably be cured within thirty [30] days, if LESSOR has not, within said thirty [30] day period, commenced to cure the default, and thereafter diligently and in good faith continues to cure the default) then, and in addition to the other remedies or courses of action now or hereafter provided by law, LESSEE may, at its option, among other things, cancel and annul this lease . . . ."

the matters identified in SAV MAX's letter of August 1, 2005, and that Plaintiff is not indebted to Sav Max in any amount on account of the events, facts and circumstances identified in SAV MAX's letter of August 1, 2005." OPT grounded its request for judgment on the assertion the estoppel certificate barred Sav Max from claiming OPT was in default due to the break-in and theft damage. OPT also alleged Sav Max had not given sufficient notice, in any event, to trigger an obligation to repair.

Sav Max filed a cross-complaint for declaratory relief and breach of contract. Sav Max claimed it gave notice triggering an obligation by OPT to act on three occasions: May 5, 2005 (Chamberlain's letter to Kirkpatrick), May 20, 2005 (Sav Max's revisions to the estoppel certificate) and June 1, 2005 (Chamberlin's fax to Lomas attaching a copy of the May 5 letter to Kirkpatrick). Sav Max thus asserted the Lease terminated pursuant to Section 16B on the date of the break-in and theft (before the sale to OPT closed) and it owed no rent thereafter. It also sought to recover $118,984.03, the amount of rent it had paid between April 28 and August 1, 2005.

The case was tried to the court in two phases. The first phase focused on whether the Lease had been terminated; the second, on the amount of rent owed.

The parties filed trial briefs at the outset of phase one. OPT maintained: (a) Sav Max's claims that OPT had defaulted and the Lease had terminated were barred by the estoppel certificate; (b) Sav Max had not given adequate notice, in any event, to give rise to a default; and (c) the break-in and theft did not, in any case, deprive Sav Max of 25 percent of the floor space for its purposes and therefore any failure to repair was not a "material" breach of the Lease. Sav Max, in turn, asserted: (a) it had not "released" OPT from any "obligation under the lease" by signing the estoppel certificate; (b) it had given adequate notice of the theft damage and required repairs on three dates ; (c) OPT's August 5, 2005, letter (responding to Sav Max's August 1 letter declaring the Lease terminated) constituted an "elect[ion] not to repair"; and (d) the Lease terminated by its own terms under Section 16B. Sav Max further asserted that, even if the Lease did not terminate by its own terms, Sav Max was justified in not paying rent because OPT had

breached the implied covenant of quiet enjoyment by failing to provide a working electrical system.

Both parties introduced evidence of their "intent" and "understanding" in regard to the estoppel certificate. Chamberlain (Sav Max's property manager) testified it was his "understanding that the landlord was responsible for the repair [of the electrical system]," either the "future landlord or the present landlord. I see little or no differentiation between the two." Chamberlain acknowledged he was aware Kirkpatrick had filed an insurance claim for the theft damage, and at the time the estoppel certificate was being circulated and reviewed, he "had no reason to believe that the landlord [at that time Kirkpatrick] would not make the repair." Gary Hammett (vice president of real estate for Unified Western Grocers, Inc. (the parent company of Sav Max)), similarly testified it was his intent "that the casualty or the damage was going to be repaired either by the original landlord or by the new landlord." Neither Chamberlain nor Hammett testified about any discussions they had with Yeager, who reviewed and revised the estoppel certificate, and Yeager did not testify. In contrast, David Becker, the chief financial officer of Cadence Capital Investments (which has a controlling interest in OPT), testified it was his understanding OPT had no obligation in connection with the theft damage because the "estoppel that said that any damage that had occurred prior to the date of the purchase was not my obligation, that the tenant would not look to me for it."

At the conclusion of the first phase, the parties argued their positions to the court, largely tracking what they had said in their trial briefs. At the end of OPT's opening argument, the trial court inquired whether Sav Max's August 1, 2005, letter (declaring the Lease terminated under Section 16 of the Lease because OPT had not repaired the theft damage) might, itself, constitute "notice" triggering a repair obligation. The court observed Section 25 of the Lease obligated the landlord, upon notice of a default under the Lease, to cure the default within 30 days.[4] OPT responded the only reasonable

[4] See footnote 3.

reading of Sav Max's August 1 letter was that it was notice Sav Max considered the Lease terminated.

Sav Max argued multiple scenarios. It continued to maintain Chamberlin's June 1 fax to Lomas (with the attached copy of his May 5 letter to Kirkpatrick) was sufficient notice to trigger termination of the Lease in 60 days under Section 16B. It also claimed it had given sufficient notice to Kirkpatrick on May 5 and to OPT on May 20 via its changes to the estoppel certificate. It argued the lack of electrical service to the building was a breach of the covenant of quiet enjoyment and constituted a constructive eviction. And heeding the trial court's inquiry, Sav Max argued, at the very least, its August 1 letter constituted sufficient notice to repair under Section 16 and that was true even if the damage deprived it of less than 25 percent of the floor space. Thus, Sav Max claimed OPT's August 5 letter, in which it declined to repair the theft damage, was either an election not to repair under Section 16B, resulting in termination as of the date of the break-in and theft, or a refusal to repair, allowing Sav Max to cancel the Lease under Section 25 via its letter of August 12.

Following closing arguments, the trial court issued a statement of decision as to the phase one issues. The court first concluded the estoppel certificate had no bearing on the outcome. It reasoned the certificate "certifi[ed] that Kirkpatrick . . . had fulfilled its obligations and promises under the lease EXCEPT with respect to the recent theft of wiring from the premises and damage to certain switching gear resulting from a break in" and that Paragraph 13, which stated in part "Buyer shall not be liable for any act or omission of" Kirkpatrick, had "to be read in conjunction with paragraph 10, i.e., EXCEPT with respect to the recent theft . . . ." The court next concluded neither Chamberlin's May 5 letter to Kirkpatrick, nor his June 1 fax to Lomas (attaching a copy of his May 5 letter), was sufficient notice to trigger any repair obligation under Section 16B of the Lease. However, it concluded Sav Max's August 1 letter (declaring the Lease terminated) was sufficient notice to put OPT in default under Section 13 of the

Lease for failing to provide power to the premises.[5] The court read OPT's closing comment in its August 5 response (that it would be wasteful to make repairs until some use was going to be made of the premises) as constituting both an election not to repair and a breach, resulting in termination of the Lease under Section 25 as of August 31, 2005.

Following the second phase of the trial, the court issued another statement of decision. Although the court concluded in phase one that Sav Max had not given adequate notice triggering a repair obligation until its letter of August 1, and the Lease therefore terminated on August 31, 2005, it ruled Sav Max was relieved of its obligation to pay rent for August, which it had not done, on the ground OPT's failure to repair the theft damage was a breach of both Section 13 of the Lease (requiring the landlord to maintain electrical service to the building) and the implied covenant of quiet enjoyment. The court entered judgment on November 10, 2008, and this timely appeal by OPT and cross-appeal by Sav Max followed.[6]

## III. ANALYSIS

### *A. Estoppel Certificates*

Estoppel certificates are a unique feature of commercial real estate transactions and specifically transactions encompassing a leasehold interest. Such a transaction "typically include[s] as a closing condition the delivery of estoppel certificates . . . from tenants. . . . The obligation to deliver the estoppel certificates is typically created in [the lease] instruments and then tested when the applicable property is transferred or

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[5] Section 13 provides in pertinent part: "LESSEE agrees at its expense to maintain all other portions of the premises and to make all ordinary repairs . . . in and about the premises necessary to preserve them in good order and condition . . ." "[e]xcept for the LESSOR'S . . . obligations to maintain in good condition the structural portions of the building including foundations, slabs, walls, and electrical and plumbing services to the building."

[6] OPT has filed a motion to strike portions of Sav Max's cross-reply brief, arguing it "is in substance an unauthorized supplemental respondent's brief." We took the motion under submission on September 14, 2009, and now deny it.

financed." (Opar, John L., *Estoppel Certificates: Handle With Care* (Sep. 19, 2005) 234 N.Y.L.J 9.)

Estoppel certificates are "critical to landlords because they affect their ability to sell commercial real property and to secure financing. Estoppel certificates inform prospective buyers and lenders of the lessees' understanding of a lease agreement. By providing independent verification of the presence or absence of any side deals, estoppel certificates prevent unwelcome post-transaction surprises that might adversely affect the building's income stream, such as: Has the tenant prepaid any rent? Does the tenant have any known or suspected claims for lease violations? What is the tenant's understanding of provisions in the lease? . . . Has the landlord made all the requested improvements?" (*Robert T. Miner, M.D., Inc. v. Tustin Ave. Investors, LLC* (2004) 116 Cal.App.4th 264, 273 (*Miner*).)

Thus, "[a]n 'estoppel certificate' is a signed certification of various matters with respect to a lease [citation]. . . . [¶] . . . [¶] [A]n estoppel certificate *binds* the signatories (and their successors in interest) to the statements made and *estops* [that party] from claiming to the contrary at a later time." (Greenwald et al., Cal. Practice Guide: Real Property Transactions (The Rutter Group 2009) ¶¶ 7.292 to 7.292.2, pp. 7-73 to 7-74 (rev. #1 1997).) Black's Law Dictionary defines "estoppel certificate" as " '[a] signed statement by a party, such as a tenant or a mortgagee, certifying for the benefit of another party that a certain statement of facts is correct as of the date of the statement, such as that a lease exists, that there are no defaults and that rent is paid to a certain date. Delivery of the statement by the tenant prevents (estops) the tenant from later claiming a different state of facts.' (Black's Law Dict. (6th ed. 1990) p. 551, col. 2.)" (*Plaza Freeway Ltd. Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th 616, 626 (*Plaza Freeway*).)

An estoppel certificate is not a contract. It is executed by only one party, and requires no consideration. (See *Plaza Freeway, supra,* 81 Cal.App.4th at p. 626.) However, it is a "written instrument," and as such triggers "the [Evidence Code

section] 622[7] *conclusive presumption* that the facts recited are 'true as between the parties. . . .' " (Greenwald et al., Cal. Practice Guide: Real Property Transactions, *supra*, ¶ 7:292.2, p. 7-74, quoting *Plaza Freeway, supra*, at p. 626.)

*Plaza Freeway* is instructive as to the importance and conclusive effect of an estoppel certificate. There, in connection with the sale of a commercial property, the tenant executed an estoppel certificate stating the lease term " 'commenced on November 1, 1973 and will expire on October 31, 1998.' " (*Plaza Freeway, supra*, 81 Cal.App.4th at p. 620.) Under the lease, the tenant had three, five-year options to renew, but was required to notify the landlord of its intent to renew 12 months before the expiration date of the lease. The tenant gave notice of its intent to renew on January 26, 1998, which the landlord rejected as untimely. The tenant sent a second notice, indicating its belief the lease terminated on March 29, 1999, five months later than it had represented in the estoppel certificate. (*Ibid.*) The owner filed an unlawful detainer action. The trial court ruled in the tenant's favor, concluding the lease term actually expired on June 30, 1999, eight months later than the tenant had represented in the estoppel certificate. (*Id.* at pp. 620-621.)

The Court of Appeal reversed, holding the tenant was estopped from taking any position contrary to its representation in the estoppel certificate that the lease terminated on October 31, 1998. As the appellate court explained, "[e]ven if the estoppel certificate contains an erroneous recitation of the lease terms, the facts contained in the certificate are conclusively presumed to be true under section 622." (*Plaza Freeway, supra*, 81 Cal.App.4th at p. 628.) This is because estoppel certificates "are almost always used in commercial real estate transactions. They inform lenders and buyers of commercial property of the tenant's understanding of the lease agreement. . . . Thus, application of section 622 to estoppel certificates would promote certainty and reliability in commercial

[7] Evidence Code section 622 provides: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration."

transactions. A contrary conclusion would defeat the purpose behind the widespread practice of using estoppel certificates." (*Id*. at pp. 628-629.)

*Miner* also acknowledges the importance of estoppel certificates in commercial real estate transactions. (*Miner*, *supra*, 116 Cal.App.4th at p. 273.) However, in that case the estoppel certificate was ambiguous because it confirmed in one paragraph that the lease, which included express option-to-renew provisions, was in full force and effect, yet stated in another paragraph that there were no options. (*Id.* at pp. 270-271.) The Court of Appeal therefore reversed a summary judgment in favor of the landlord on the ground the landlord had not carried its burden of showing there was no triable issue of material fact as to the meaning of the representations in the estoppel certificate. (*Id.* at p. 273.) The reversal left "all issues open for trial, including the meaning of the Estoppel Certificate (should there be any competent extrinsic evidence on the subject)." (*Ibid.*)

In *Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, the defendant seller prepared and "put" into escrow an estoppel certificate for an uncooperative subtenant showing a specified monthly rental, which turned out to be incorrect. The plaintiff buyer did not sue the subtenant, but instead sued the seller on the ground the seller had been required by the terms of the transaction to supply correct information about all tenants, including the rent paid. (*Id.* at pp. 512-514.) A jury rejected the buyer's tort claims, but found the seller had breached its contract with the buyer and awarded as damages the difference between the rent the subtenant actually paid and the greater amount the seller had incorrectly set forth in the estoppel certificate. (*Id.* at p. 515.) The Court of Appeal affirmed, rejecting the seller's arguments that the buyer had not relied on the estoppel certificate and the jury had not been correctly instructed on causation. (*Id.* at pp. 524-532.) In doing so, the court repeatedly noted the importance of the estoppel certificate to the buyer and observed the buyer "had every right to rely upon" the information set forth therein. (*Id.* at pp. 527, 529-530, 532.)

***B. Interpretation of Estoppel Certificates***

OPT and Sav Max disagree as to the rules we should apply in interpreting the estoppel certificate executed by Sav Max. OPT argues estoppel certificates are

interpreted in accordance with the rules governing the construction of contracts generally. Sav Max argues these rules do not apply because an estoppel certificate is "not an agreement, [but] an instrument." Relying on the statement in *Plaza Freeway* that estoppel certificates "inform lenders and buyers of commercial property of the tenant's understanding of the lease agreement," Sav Max claims the tenant's intent is paramount, and thus we must construe the estoppel certificate in accordance with *its* asserted intent and understanding of the document. Sav Max's reliance on this language is misplaced. The court was explaining the purpose of an estoppel certificate, not discussing the rules of construction and interpretation applicable thereto. (*Plaza Freeway, supra*, 81 Cal.App.4th at pp. 628-629.)

While an estoppel certificate is a written "instrument" and not a contract, that does not mean different rules of construction apply. To the contrary, courts interpreting written "instruments" have routinely looked to the rules governing the construction of contracts generally. (See, e.g., *Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1483-1484 [interpreting a release]; *Richeson v. Helal* (2007) 158 Cal.App.4th 268, 276 [interpreting a restrictive covenant]; *Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618, 622 [interpreting a deed]; *Perkins v. Maiden* (1943) 57 Cal.App.2d 46, 52 [interpreting correspondence regarding a financial transaction].) Thus, it is no surprise that in *Miner*, when the court was confronted with issues of construction in connection with an estoppel certificate, it likewise looked to the general rules of contract construction. (*Miner, supra*, 116 Cal.App.4th at pp. 270-272; see also Greenwald et al., Cal. Practice Guide: Real Property Transactions, *supra*, ¶ 7:292.5, p. 7-75 [discussing application of general rules of contract construction to estoppel certificates].)

The fundamental principles of contract construction are well established. "The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. (Civ. Code, § 1636.) Where . . . there is a written contract, the parties' intention is determined from the writing alone, if possible. (Civ. Code, § 1639)" (*Miner, supra*, 116 Cal.App.4th at p. 271.) "Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible'

[citations], and it is the instrument itself that must be given effect." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) The language of a contract should be interpreted as a whole and " 'cannot be found to be ambiguous in the abstract.' " (*California National Bank v. Woodbridge Plaza LLC* (2008) 164 Cal.App.4th 137, 143 (*Woodbridge*), quoting *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) The whole of a contract also "is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Contractual language should be read in a way that is "reasonable and fair," and not so as to "lead to unfair or absurd results." (*Woodbridge, supra*, 164 Cal.App.4th at p. 143.)

***C. Standard of Review***

The interpretation of a contract presents a question of law subject to de novo review unless it turns on the credibility of extrinsic evidence. (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 713; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 799.) However, even in cases where the trial court has allowed extrinsic evidence, unless the evidence "is conflicting and requires a determination of credibility, the reviewing court is not bound by the trial court's interpretation." (*Badie v. Bank of America, supra*, at p. 799.) To the extent the interpretation of a contract involves a factual finding, we confine our review of such finding to whether it is supported by any substantial evidence. (*Roden v. Bergen Brunswig Corp*. (2003) 107 Cal.App.4th 620, 624-625.)

***D. The Estoppel Certificate Executed By Sav Max***

As we have discussed, an estoppel certificate is a critical document in a commercial real estate transaction involving a leasehold. Both seller and purchaser rely on the representations and assurances made therein by the tenant to ensure a full and complete understanding of the scope and nature of the leasehold and the status of the existing landlord-tenant relationship.

Sav Max's claim that the Lease terminated—either on April 28, 2005, as it maintained at the time of the events in question, or on August 5, 2005, as it argued alternatively at trial, or on August 31, 2005, as the trial court concluded—is based on the

following premise: Both Kirkpatrick and OPT had an obligation to repair the theft damage and the failure to repair, after sufficient notice, constituted a default, resulting in termination of the Lease. Chamberlain (Sav Max's property manager) thus testified it was his "understanding that the landlord was responsible for the repair" either the "future landlord or the present landlord. I see little or no differentiation between the two."

Sav Max contends its "understanding" was made manifest by the language it added to paragraphs 3 and 10 of the estoppel certificate. By adding that language, Sav Max claims "it was ensuring that its landlord would make the necessary repairs" either the "future landlord or the present landlord." Sav Max could have said exactly that in the estoppel certificate. But it did not.

The estoppel certificate expressly defined the terms "Landlord," "Tenant" and "Buyer," and Sav Max made no changes to these definitions. Heeding these definitions, it simply is not possible to read the estoppel certificate as comporting with Sav Max's "understanding," i.e., that both Kirkpatrick and OPT were obligated to repair the theft damage and failure to repair, after sufficient notice, would constitute a default, resulting in termination of the Lease. This is apparent when the definitions, themselves, are used in place of the defined terms.

Making these substitutions, Paragraph 10 of the estoppel certificate reads as follows (with the language added by Sav Max underlined and language we have italicized for emphasis discussed below): "[T]o the best of [Sav Max's] knowledge, [Kirkpatrick] has fulfilled all of its duties and obligations under the Lease, neither [Sav Max] nor [Kirkpatrick] is in default under the terms, covenants or obligations of the Lease, and ***no fact or condition now exists that, with notice or lapse of time or both, will become a default.*** [Sav Max] has no offsets, counterclaims or credits against rentals, nor does [Sav Max] possess or assert any claims against [Kirkpatrick] for any failure of performance of any of the terms of the Lease. The improvements and space required to be furnished according to the Lease have been completed in all respects and, to the best of [Sav Max's] knowledge: (i) the Premises comply with all applicable laws, (ii) there are no hazardous materials on, in, under or about the Premises, (iii) there are no structural or

mechanical defects in the Premises, (iv) [Sav Max's] operation and use of the Premises does not involve the generation, storage, treatment, disposal or release of hazardous substance into the environment . . . and (v) the Premises is being operated in accordance with all applicable environmental laws. [Kirkpatrick] has no obligation to construct, refurbish, install, rehabilitate or renovate any existing or additional improvements in the Premises or in the Property, except with respect to the recent theft of wiring from the Premises and damage to certain switching gear resulting from a break in." (Italics added.)

Paragraph 13, in turn, again making these substitutions, provides: "[Sav Max] acknowledges and agrees that [OPT] shall not be liable for any act or omission of any person or party who may have been a landlord under the Lease prior to [OPT's] acquisition of the Property, and [OPT] shall not be subject to any offset or defenses which [Sav Max] may have against any such prior landlord."

This rendition of paragraphs 10 and 13, and a comparison of their language, reveals that paragraph 10, including the language added by Sav Max, said absolutely nothing about OPT, let alone stated that *both* Kirkpatrick and OPT were obligated to repair the theft damage.

The language in paragraph 10 we have italicized for emphasis also highlights a critical representation made by Sav Max—that "neither [Sav Max] nor [Kirkpatrick] is in default under the terms, covenants or obligations of the Lease, and ***no fact or condition now exists that, with notice or lapse of time or both, will become a default***." At the time Sav Max made this representation, it was fully aware of the facts pertaining to the break-in and theft and the resulting condition of the premises. Thus, by virtue of this language, Sav Max made a binding representation that those facts and condition of the premises would *not*, with either notice or lapse of time, or both, become a default. Yet, Sav Max took exactly the opposite position in its August 1, 2005 letter to OPT, when it claimed it had given sufficient notice of the break-in and theft and condition of the premises, and the lapse of time without repair (60 days), resulted in a default and termination of the Lease.

However, under the law, Sav Max could not take one position in the estoppel certificate—i.e., that there were no facts and circumstances that, with notice or lapse of time, or both, could lead to a default—and take the opposite position only months later—i.e., that the facts and circumstances in existence and known to Sav Max at the time it executed the estoppel certificate did, indeed, with notice and the passage of time, ripen into a default, resulting in termination of the Lease. Rather, Sav Max is bound by its representation in the estoppel certificate that there were no facts or circumstances that with notice or lapse of time, or both, would become a default. And the facts and circumstances to which this assurance pertained included the break-in and theft damage of which Sav Max was fully aware.

The language Sav Max added to paragraph 10 did not alter the significance or conclusiveness of this representation and assurance. The phrase "To the best of [Sav Max's] knowledge," which Sav Max added at the beginning of the first sentence of the paragraph, is of no consequence because Sav Max knew about the break-in and theft and condition of the premises. The language Sav Max added to the end of the fourth sentence of the paragraph, excepting "the recent theft of wiring . . . and damage to certain switching gear," did not alter the explicit representation made in the first sentence as to the absence of any prospective default upon notice or lapse of time. Rather, the fourth sentence addressed simply the status of "improvements"; it said nothing about the prospect of default, which the first sentence explicitly addressed. (See *Miner, supra,* 116 Cal.App.4th at 273.) Sav Max's argument that the only "blank" to "fill in" in paragraph 10 was at the end of the fourth sentence and the language it added there must be read as modifying the first sentence, as well, is not well taken. The estoppel certificate was in a format that allowed Sav Max to modify or make additions to any of the language, and it did both in connection with other provisions of the document, including adding language at the beginning of the first sentence of paragraph 10.

The language Sav Max added to paragraph 3 of the estoppel certificate, so that it read—"The Lease contains no option to terminate, <u>except in certain instances of damage or destruction as provided in the Lease</u>"—also added nothing of import. The added

language simply referred to the provisions of the Lease, and did not alter any of the representations and assurances made in the other paragraphs of the certificate.

Furthermore, Sav Max made no changes to paragraph 13, which, in contrast to paragraph 10, not only mentioned OPT, but expressly assured OPT it would "not be liable for any act or omission of any person or party whom may have been a landlord under the Lease prior to [OPT's] acquisition of the Property." Sav Max could have changed this language or added an exception stating OPT was responsible for the break-in and theft damage occurring before its acquisition of the property and while Kirkpatrick was the landlord. But it did not.

Sav Max's asserted "intent" cannot override the plain language of the estoppel certificate. " 'Extrinsic evidence is "admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible" [citations], and it is the instrument itself that must be given effect.' " (*American President Lines, Ltd. v. Zolin* (1995) 38 Cal.App.4th 910, 923.) "The court does not have the power to create for the parties a contract which they did not make, and it cannot insert in the contract language which one of the parties now wishes were there." (*Levi Strauss & Co. v. Aetna Casualty & Surety Co.* (1986) 184 Cal.App.3d 1479, 1486.) As Sav Max itself asserts in its brief, "no authority sustains the proposition that under the guise of construction or explanation a meaning can be given to the instrument which is not to be found in the instrument itself, but is based entirely upon direct evidence of intention independent of the instrument. It has been well said that in the admission of extrinsic evidence the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument, and not what was intended to be written." (*Payne v. Commercial Nat. Bank* (1917) 177 Cal. 68, 72.) Even if the language Sav Max added created an ambiguity, which we do not perceive, it would be resolved against Sav Max, since Sav Max drafted the language. (Civ. Code, § 1654; *Federal National Mortgage Assn. v. Bugna* (1997) 57 Cal.App.4th 529, 534-535.)

Sav Max argues the estoppel certificate was binding only as to represented "facts" and any assurances it made as to compliance with the Lease or potential for default were legal conclusions and not binding. However, representations in an estoppel certificate that a landlord is or is not in compliance with the lease, or is or is not in default, are standard. (See *Miner, supra*, 116 Cal.App.4th at p. 273; *Plaza Freeway, supra*, 81 Cal.App.4th at p. 626.) This is not surprising, since a tenant's position as to whether a landlord is in compliance with lease terms or is in default is critical information to a lender or purchaser. (See *Miner*, at p. 273.) Sav Max's argument also has a decidedly hollow ring. It made no objection at the time it signed the estoppel certificate that it could not make the representations it now calls nonbinding legal conclusions, despite careful review of the certificate and changes to its language by its attorney. And barely two months after signing the certificate, it had no difficulty whatsoever in asserting OPT was in default and the Lease had terminated.

Save Max also argues the estoppel certificate did not "amend" the Lease or "excuse" OPT from any landlord obligations imposed thereunder, including under Section 13 to provide electrical service to the building. It is true the estoppel certificate did not modify or excuse compliance with any provision of the Lease. But this argument misperceives the significance of the estoppel certificate. The estoppel certificate supplied the universe of facts and circumstances against which every provision of the Lease had to be read. And that operative universe was conclusive even if, after the production of evidence, a court could conclude the facts and circumstances were actually different than as represented in the estoppel certificate. In *Plaza Freeway*, for example, the lease expiration date in the estoppel certificate was conclusive, even though the trial court found, after hearing evidence, that the lease actually expired on a different date. Similarly, here, Sav Max's representation that no fact or condition existed that, with notice or lapse of time, or both, would become a default was conclusive, regardless of any conclusion, under any provision of the Lease, the trial court might draw to the contrary after hearing evidence. Indeed, the final paragraph of the estoppel certificate expressly provided that "if any of the statements made in this Estoppel Certificate prove

to be inaccurate," the effect will be "to estop [Sav Max] from denying the accuracy of such statements."

Sav Max was a sophisticated tenant fully conversant with all the provisions of the Lease, and represented by its own attorney. It is bound by the representations and assurances it made in the estoppel certificate. These representations and assurances told OPT there were no facts and circumstances that with notice or the lapse of time would lead to a default and further told OPT it would not, in any event, be liable for any act or omission of a prior landlord.

***E. Extent of Declaratory Relief***

OPT sought not only a declaration that the Lease remained "in full force and effect" but also declarations that (a) "SAV MAX's obligation to pay rent and to otherwise perform its duties under the lease is unaffected by the matters identified in paragraph 10 of the Estoppel Certificate" and (b) "SAV MAX's obligation to pay rent and to otherwise perform its duties under the lease is unaffected by the matters identified in SAV MAX's letter of August 1, 2005, and that Plaintiff is not indebted to Sav Max in any amount on account of the events, and circumstances identified in SAV MAX's letter of August 1, 2005." OPT did not seek an award of money damages.[8]

Sav Max argues any relief in connection with rent is "moot" and OPT cannot obtain a "declaration that it is permitted to receive unpaid rent from Sav Max" because OPT received sums from Kirkpatrick pursuant to the rent guarantee Kirkpatrick executed as part of the real estate sale transaction. Sav Max asserts such declaratory relief "would permit [OPT] to receive a legally impermissible double recovery" because the collateral source rule does not apply to "damages for breach of contract."

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[8] In its original complaint, OPT sought an "[o]rder . . . requiring SAV MAX to pay the rent due on the first day of August 1, 2005, and all periods prior to judgment, [and] penalties as required under the Lease." Prior to trial, OPT stated it would move to amend by "dropping all claims for 'coercive' relief." The trial court, in turn, issued an order stating it would proceed with a bifurcated trial on the condition OPT struck the language from its complaint, which OPT did.

Sav Max cites no authority for the proposition that its obligation to pay rent under the Lease to OPT was extinguished by virtue of the guarantee agreement between OPT and Kirkpatrick. This is not an action for "damages for breach of contract." It is strictly an action for declaratory relief. Furthermore, the rent obligation under the Lease was owed by Sav Max, not Kirkpatrick. Kirkpatrick, as the guarantor of Sav Max's rent payments, had " 'a separate and independent obligation from that which [bound] the principal debtor.' " (*Talbot v. Hustwit* (2008) 164 Cal.App.4th 148, 151, quoting *Security-First Nat. Bank v. Chapman* (1940) 41 Cal.App.2d 219, 221.) Whatever rights Kirkpatrick might have upon the payment of any rent by Sav Max to OPT, to recoup amounts it paid to OPT as guarantor, is a matter between Kirkpatrick and OPT. Kirkpatrick is not a party to this case. Accordingly, whatever rights and liabilities Kirkpatrick may have as to OPT, or as to Sav Max, are not before us.[9]

## IV. DISPOSITION

The judgment against OPT and in favor of Sav Max is reversed, and the matter is remanded with instructions to enter declaratory judgment for OPT consistent with this opinion. In light of our disposition, we do not reach the issues raised by Sav Max in its cross-appeal. OPT is awarded its costs on appeal.

_____
Banke, J.

We concur:

_____
Marchiano, P. J.

_____
Dondero, J.

[9] Sav Max complained in the trial court and continues to complain on appeal that Kirkpatrick is paying for the costs of this lawsuit. This is irrelevant to the issues tried below and raised on appeal, which concern only the rights and liabilities of OPT as purchaser under the sale documentation.